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Attorney for Defendant
 ALLAN GREEN

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

VNCI Inc., et al
 (Allan Green)

Defendant.

No. CR-05-00208-CRB

**DEFENDANT'S SENTENCING
 MEMORANDUM**

Date: April 9, 2008

Time: 2:15 p.m.

Court: Hon Charles R. Breyer

Defendant Allan Green entered a plea of guilty to one count of conspiracy to commit fraud in relation to the E-Rate application of the Philadelphia Academy Charter School. Mr. Green submits the Court should sentence him to a term of probation, with a term of home detention or community confinement, based on, among other factors, Mr. Green's minor role in the offense, the absence of any actual monetary loss as a result of Mr. Green's offenses, and Mr. Green's cooperation.

Mr. Green submits that an appropriate sentence in his case is a term of three years probation with the condition that Mr. Green serve 60 days in a community confinement facility followed by 180 days in home detention.

I. THE OFFENSE CONDUCT.

Judy and Allan Green, now both in their 60's, were both career public school system employees. Both had long careers in public education and neither had any criminal history

1 whatever prior to this case. Judy Green worked as a public school teacher for 18 years in New
2 York City, followed by 15 years in Los Angeles. Allan Green worked as a high school math and
3 science teacher, counselor and finally as an assistant principal with the L.A. Unified School
4 District for 16 years, from February, 1985, to July, 2001 when he retired.

5 Judy Green became involved in the E-Rate and related computer technology programs
6 while she was working for the L.A. Unified School District. She garnered both technical
7 expertise with respect to computer networking, and expertise with the Federal E-Rate program
8 while still a school district employee. Towards the end of her career with LAUSD she began
9 consulting with other school districts to assist them with their E-Rate applications. In
10 approximately 1998 she incorporated ADJ, Inc., as a consulting firm under which she operated
11 her consulting business. ADJ was initially incorporated with Allan as an officer simply because
12 officers must be named for incorporation. He played no active role in the company whatever,
13 since he was a full-time employee of LAUSD. After ADJ was incorporated Judy traveled
14 frequently on her consulting business and Allen was rarely with her because of his job with
15 LAUSD.

16 Initially Judy conducted her consulting business while working at LAUSD. She left
17 LAUSD in 1999 and she worked for VNCI, Inc., from 1999 to August 2001. Most of the
18 offenses for which she has been convicted occurred from this point on. Allan Green had no
19 involvement with VNCI whatever. To him VNCI was simply the firm that his wife was working
20 (and traveling frequently) for. After Judy left VNCI she resumed using ADJ as the vehicle for
21 her consulting work.

22 After he retired in 2001 Mr. Green had nothing to do, so he began to travel with Judy to
23 keep her company and assist in relatively menial ways with her consulting business. Judy
24 possessed a great deal of expertise concerning the very complex and bureaucratic E-Rate
25 application process. Allan, in contrast, knew next to nothing about the E-Rate application
26 process. He also knew nothing whatever about computer network technology. His work for his
27 and his wife's company, ADJ Consulting, consisted of acting as his wife's assistant. As the
28 Presentence Report notes, "Witnesses fairly uniformly described Allan Green as Judy Green's

1 ‘secretary’ or ‘puppet.’ He largely sat quietly by her side at meetings and responded to her every
 2 beck and call, including carrying her bags and getting lunch. ...” PSR at ¶ 20 By that time, Judy
 3 Green had already been working for a long time as an E-Rate consultant, and she and the other
 4 charged conspirators such as George Marchelos had been running their E-Rate business for
 5 several years.¹

6 Judy Green was the driving force behind ADJ, and behind the E-Rate business at VNCL.
 7 Allan became involved with his wife’s business only after his retirement, at the very end of the
 8 charged offenses. The acts charged in the indictment occurred basically between 1998 and 2003.
 9 Allan Green plead guilty to a conspiracy to defraud which took place basically in the last few
 10 months of 2002 and the first few months of 2003. As Allan Green’s Presentence Report notes,
 11 “Judy Green functioned as an intermediary between prospective competing vendors in a ‘hub-
 12 and-spoke’ bid-rigging conspiracy. She was at the center of the conspiracies, acting to
 13 coordinate the vendors’ bids, and she was the key decision maker as to which vendor would
 14 receive which portion of the project” PSR at ¶ 13. Allan had no knowledge whatever of the
 15 application and bidding requirements of the E-Rate program, or the technical distinctions
 16 between eligible and ineligible products. He never advised any school districts about E-Rate or
 17 technology. During the last year to year and a half of the charged conspiracies he traveled with
 18 his wife and assisted her primarily with administrative matters such as note-taking, mailing,
 19 errands, etc.

20 As the court will recall, Judy Green submitted a sworn declaration in support of Allan
 21 Green’s motion to sever. In her declaration, Judy Green described her husband’s role in the
 22 fraudulent scheme she directed:

23 Though Allan accompanied me to many meetings at which E-Rate information
 24 was disseminated, Allan did not play a significant role in the E-Rate business.
 25 Instead, Allan acted essentially as my administrative assistant on these matters.
 26 Allan simply did not possess the technical expertise and background in the E-Rate
 27 program that I possessed, and which was required to operate the E-Rate consulting
 28 business I ran....

¹ Mr. Green was initially charged in only the last 2 of the 22 counts in the original Indictment in this case. Those counts will be dismissed upon his sentencing for his role only in the Philadelphia Academy application.

1 In 1998 I formed the company ADJ Consultants, Inc. along with Michael Kurz.
 2 Though Allan's name was eventually placed on the company charter as an owner
 3 and president, Allan's position in the company was merely titular. In fact, Allan's
 4 role at ADJ was to be my administrative assistant. I made all of the strategic and
 substantive business decisions concerning the day-to-day operation of ADJ. Allan
 did not even begin doing any work at ADJ until he retired from the L.A. Unified
 School District in 2001.

5 In the time we owned the ADJ business, Allan never provided any substantive
 6 assistance with the preparation of E-Rate program applications, budgets,
 7 application attachments, technology plans, or any other documents or business
 8 proposals attendant to the E-Rate subsidy application process....I also sometimes
 9 directed Allan to send materials and notes to school districts and vendors when I
 10 was not in the office and Allan was.

11 Specifically in regard to the Philadelphia Academy E-Rate applications, Mrs. Green
 12 admitted in her declaration, "I directed Allan to deliver ... letter[s] to Philadelphia Academy.
 13 Allan's only role was to act as a messenger, hand delivering documents I prepared for the
 14 Philadelphia Academy. Allan did not play any substantive role in preparing the documents, or
 15 the Philadelphia Academy's 471 applications and proposed budgets."

16 In the fall of 2002 Allan Green traveled by himself to the Philadelphia Academy at Judy
 17 Green's request. This was a highly unusual activity for him relative to Judy's E-Rate business.
 18 Judy was too busy soliciting business and preparing applications for E-Rate Year 6 to travel in
 19 order to personally meet with all of the school districts that she was soliciting business from. She
 20 sent Allan Green to make initial contacts with Philadelphia Academy, after which she took over
 21 all substantive work on that application.

22 Though it might seem that Judy Green's statements indicating her husband played a very
 23 minor role in her offenses should be viewed with caution, her statements are corroborated by the
 24 statements and testimony of numerous government witnesses regarding Allan's role in Judy's
 25 consulting business, including the following.

26 A. Witness Brien Gardiner

27 In April of 2005, when interviewed by attorneys from the Department of Justice, Brien
 28 Gardiner, the chief administrator of Philadelphia Academy Charter School, said that Allan Green
 said his wife was very knowledgeable about the [E-Rate] program and able to help
 them fill out the necessary forms. Mr. Green mentioned to Brien Gardiner and
 Kevin O'Shea that Mrs. Green traveled from school to school helping fill out the
 E-Rate forms. Kevin O'Shea asked Mr. Green for the name of the company his
 wife worked for. Mr. Green told Kevin O'Shea that he did not know the name of

1 her company. . . . Mr. Green then called his wife to find out the name of her
2 company.

3 The reason Mr. Green was not sure which company he was representing was that Judy
4 Green was acting variously on behalf of several "foundations", and on behalf of ADJ, with
5 respect to different school districts

6 Mr. Gardiner also testified at Judy Green's trial. During the course of his testimony, Mr.
7 Gardiner noted that Allan Green "set up" the first, introductory meeting between ADJ and the
8 Philadelphia Academy staff. However, Mr. Gardiner noted that after the initial meeting was
9 arranged by Allan Green, Judy Green took control of the Philadelphia Academy's E-Rate
10 application. According to Mr. Gardiner, "Mrs. Green indicated she could help us do that and
11 pretty much do it from inception, from beginning to end, the whole process."

12 Concerning the Philadelphia Academy's E-Rate application and co-pay, Mr. Gardiner
13 testified (at Judy Green's trial) to the following:

14 Q. You mentioned that Ms. Green said she was going to help with your e-rate
15 process?

16 A. That's correct.

17 Q. What e-rate funding year was this for?

18 A. The best of my recollection it was year six.

19 Q. Just for the jury's reference, this is one of the projects charged in counts 21 and
20 22 of the indictment. What did Ms. Green say about her role in the application
21 process for e-rate?

22 A. She was going to help us get some foundation funding to cover the part that
23 wasn't funded by e-rate.

24 Q. So let's spell that out a little bit. What is your understanding regarding
25 typically under the e-rate program how much a school like yours would have to
26 pay?

27 A. Somewhere in the neighborhood of 20 percent.

28 Q. What did Ms. Green say to you at this meeting about your obligation to pay
that 20 percent?

A. She indicated that she had people who are anxious to donate money that would
provide for that percentage that we would be responsible for.

Q. Did she say -- did she refer to any organization that would be making that
donation to the school?

1 A. Again, to the best of my recollection, it was something like the American
Education Alliance or foundation.

2 Q. Aside from this issue related to the foundation and covering your copay share,
3 did Ms. Green say anything about her role in the e-rate application process, the
4 paperwork process?

5 A. Again, to the best of my recollection, the conversations surrounded the fact
6 that everything would be done; we wouldn't have to do anything.

7 Q. Everything would be done by whom?

8 A. The paperwork would be done.

9 Q. By whom?

10 A. By the organization. I'm not sure which individual would do it, but by the
11 organization.

12 Q. When you say "the organization," who are you referring to?

13 A. It was Mrs. Green and her husband's -- her husband's company, I guess, was
14 the people that were going to do the work.

15 The "company" to which Mr. Gardiner referred, the company that Mr. Gardiner
16 understood would handle Philadelphia Academy's E-Rate applications, was ADJ Consulting.
17 Mr. Green submits that given the statements of the other government witnesses in this case, it is
18 evident that Allan Green did not perform any substantive work on the E-Rate applications
19 handled by ADJ and Judy Green.²

20 B. Government Witness Richard Favara

21 In June of 2003 Mr. Favara told the F.B.I. that Judy Green "was instrumental in helping
22 schools obtain E-Rate funding," and that Judy Green, "used a computer company called
23 Excalibur . . . to put T-1 lines in school districts. Mr. Favara further indicated Judy Green got
24 Expedition networks (Mr. Favara's company) involved in the Lee County School District E-Rate
25 application, and that it was also Mrs. Green who spoke with him about Expedition refunding
26 some money to the school districts in order to fund the districts' co-pay requirement. In a lengthy
27 interview in June of 2003, Mr. Favara's only description of Allan Green participating in the E-
28 Rate program consulting business was: "GREEN and her husband, ALAN GREEN (ALAN), had

² In his debriefings, cooperating witness George Marchelos described Ms. Green as a "control freak" who insisted on personally reviewing all matters related to the subject E-Rate applications.

1 contacted school districts with regard to E-Rate ...". All of his detailed statements regarding the
2 E-Rate consulting business detailed Judy's activities.

3 During his December 2004 interview, Mr. Favara told the F.B.I. and D.O.J. attorneys that
4 he was referred to Judy Green by Steve Newton, and that Mrs. Green represented herself to be an
5 expert on E-Rate. Mr. Favara did not indicate Allan Green possessed any such expertise.
6 Moreover, according to Mr., Favara, when he met with the Greens, "[Judy] GREEN did all the
7 talking and ALAN would pull out documents." This description of Allan Green acting as Judy
8 Green's assistant while Mrs. Green conducted meetings with E-Rate vendors exactly corresponds
9 with Judy Green's declaration which filed under seal in support of Allan Green's severance
10 motion.

11 C. Government Witness Erik Plesset

12 According to Mr. Plesset, "at the October 9th meeting [2002, at the ADJ office], I met
13 Alan Green, Judy's husband. He was a nice man that seemed to be like a secretary to Judy and
14 did whatever she said, mailing things, traveling with her and carrying her bags etc."

15 In an earlier statement to the F.B.I., Plesset indicated, "[Judy] Green completed the FCC
16 form 470 and 471. She would prepare the E-Rate bids on the 470 forms and she would change
17 prices which Derosset and Plesset had created for the costs of goods and services . . . Green
18 completed the 470s in such a way to assure the companies associated with she and [co-defendant]
19 Newton would be able to get the contracts." Plesset went on to allege that "[Judy] Green and
20 [co-defendant] Newton set up foundations to come up with the ten percent for school districts
21 that have little money," and that "Green had all the companies, such as DCC and Sema4, provide
22 her with ten percent and she would put this money into the foundation." Mr. Plesset did not at all
23 mention Allan Green as participating in any of these activities.

24 During an interview with the government on May 25, 2006, Plesset told the prosecution
25 that Allan Green was present at meetings between ADJ Consultants and the vendors, but that
26 Allan Green was Judy Green's "puppet." Plesset further noted that "Alan did what [Judy] Green
27 directed him to do." While Plesset was at meetings at ADJ, "Alan was present for a while.
28 During the time Allan was there, he sent out federal express packages to schools."

1 D. Government Witness Gordon Taylor

2 Taylor was interviewed by the F.B.I. on December 22, 2004. During this interview he
3 told the agents that Allan Green was present during a “pre-bid” meeting at the ADJ offices, in
4 January of 2003 (people from Digital Connect and Expedition were also present). However,
5 Taylor said that Allan “was not doing anything except sitting around the office.”

6 When he was again interviewed by the government in May of 2006, Gordon Taylor told
7 the government that “he did not think that Alan [Green] was that heavily involved.” Regarding
8 Allan Green’s participation in the meetings between ADJ Consultants and the E-Rate vendors,
9 Taylor noted that “Alan was always in the background, and at meetings the most he did was get
10 the sandwiches.” Mr. Taylor further noted that he understood Allan Green’s role in contacting
11 school districts was as “more of a messenger for Judy Green.”

12 Taylor was interviewed by defense investigator Oasa on March 18, 2006. [Attached
13 hereto as Exhibit A] During this interview Taylor indicated Judy Green controlled the E-Rate
14 projects and “did all the talking.” According to Taylor, Allan Green “was not knowledgeable
15 enough” about E-Rate to be of any assistance with the projects. Allan, Taylor indicated, did not
16 participate in discussions at any meetings. Instead, Allan, “got lunch,” and “sat there.” He said
17 his conversations with Allan primarily involved “small talk, chit chat.”

18 Taylor was re-interviewed by Oasa on February 10, 2007. [Attached hereto as Exhibit B]
19 During this interview Taylor again recalled that “Allan got lunch, which was important.” When
20 asked by the investigator to describe Allan’s role, Taylor replied, “I don’t know, spouse and
21 gopher?” Taylor then further explained, “Allan was hanging around, like wallpaper.” Taylor
22 said he observed Allan answer the phones and take messages, or hand the phone to Judy or
23 Plesset. Taylor concluded, “Allan was an assistant, like a clerical person.” He also indicated that
24 Allan had contact with school districts, but that these contacts involved “picking up and dropping
25 off stuff,” as well as “making calls” to schools to pass on messages from Judy.

26 E. Government Witness Alan Derossett

27 Derosset was interviewed on February 9, 2007 [Attached hereto as Exhibit C] by defense
28 investigator Ed Oasa. Derosset discussed his involvement in the Luther Burbank project, and his

1 interactions with Plesset, Newton, and Judy and Allan Green.

2 Regarding Allan Green, Derosset told the investigator, “Allan was around the [ADJ]
3 office, coming and going.” Derosset said that Allan’s role seemed to him to be “fetching water
4 and coffee for people, Allan was always there for lunch.” Derosset’s overall impression of Allan
5 was that “he was just there to support his wife.” Derosset also recalled Allan “singing a lot” to
6 the opera music that the Greens liked to play at the ADJ office.

7 Derosset did not recall any conversation with Allan on the substantive aspects of any E-
8 Rate project. Derosset said, “I don’t recall ever asking him a question.” His conversations about
9 technical issues were with Judy Green, Plesset, and, less often, Newton.

10 II. THE APPLICABLE SENTENCING FACTORS.

11 Under *United States v. Booker*, the courts must treat the guidelines as just one of a
12 number of sentencing factors set forth in the still valid portions of Sentencing Act (18 U.S.C. §
13 3553), and all sentences will be reviewed for “reasonableness,” rather than compliance with the
14 Guidelines. See *Booker* at 803-04 (“Without the “mandatory” provision, the Act nonetheless
15 requires judges to take account of the Guidelines together with other sentencing goals. See 18
16 U.S.C. A. § 3553 . . . Section 3553 . . . sets forth numerous factors that guide sentencing. Those
17 factors in turn will guide appellate courts, as they have in the past, in determining whether a
18 sentence is unreasonable.”) Since *Booker*, these factors are all appropriate sentencing concerns,
19 of which the guidelines sentencing range is only one part.

20 As the Supreme Court recently noted,

21 after giving both parties an opportunity to argue for whatever sentence they deem
22 appropriate, the district judge should then consider all of the § 3553(a) factors to
23 determine whether they support the sentence requested by a party. In so doing, he
may not presume that the Guidelines range is reasonable ... He must make an
individualized assessment based on the facts presented.

24 *Gall v. United States*, __ U.S. __, 128 S.Ct. 586, 596-97 (2007).

25 The Sentencing Act, which now guides federal judges in their selection of a sentence,
26 directs the courts to “impose a sentence sufficient, but not greater than necessary, to comply . . .
27 with the need for the sentence imposed –

28 (A) to reflect the seriousness of the offense, to promote respect for the law, and to

1 provide just punishment for the offense;

2 (B) to afford adequate deterrence to criminal conduct;

3 (C) to protect the public from further crimes of the defendant; and

4 (D) to provide the defendant with needed educational or vocational training, medical
5 care, or other correctional treatment in the most effective manner.”

6 See 18 U.S.C. § 3553(a)(2). Section 3553(a) further directs sentencing courts to consider (1) the
7 nature and circumstances of the offense and the history and characteristics of the defendant; (3)
8 the kinds of sentences available; (4) the kinds of sentences and the sentencing range established
9 for the offense under the Guidelines; (5) any pertinent policy statements issued by the Sentencing
10 Commission; (6) the need to avoid unwanted sentencing disparities among defendants with
11 similar records who have been found guilty of similar conduct; and (7) the need to provide
12 restitution to any victims of the offense. Thus, the Guidelines range for the offense is but one of
13 ten factors specified under The Sentencing Act.

14 The section 371 conspiracy offense to which Mr. Green plead guilty is a class D felony.
15 See 18 U.S.C. § 371, 18 U.S.C. § 3559(a)(4). Mr. Green is therefor eligible for probation. See
16 18 U.S.C. 3561.

17 III. APPLICATION OF THE SECTION 3553 STANDARDS TO MR. GREEN’S CASE 18 CALLS FOR A PROBATIONARY OR “SPLIT” SENTENCE.

19 In accordance with *Booker, Gall*, and the directives of 18 U.S.C. § 3553(a), Mr. Green
20 submits the following concerning the Court’s consideration of an appropriate disposition of Mr.
21 Green’s case.

22 A. The Nature and Circumstances of the Offense and the History and Characteristics of Mr. Green.

23 As the above history demonstrates, Mr. Green had, until his involvement in the E-Rate
24 matter, lived and entirely law abiding life. He had never before been arrested for any criminal
25 offense. His criminal conduct here simply cannot be fairly assessed without reference to his
26 background.

27 Mr. Green spent his adult life gainfully employed, including working for many years in
28 the public schools, first as a teacher and later as a counselor and administrator at Cooper High

1 School in San Pedro, California. Clearly, financial gain has never been one of Mr. Green's
2 primary concerns in life.

3 Mr. Green has also continued his education throughout his career in the public school
4 system, despite the fact such continuing education did not further his financial interests (Mr.
5 Green completed his Masters degree and obtained his teaching credential when he was 26, in
6 1972). In order to assure he would continue to be fully and adequately prepared for his various
7 jobs in new schools, Mr. Green continued, throughout his career, to take specialized educational
8 programs in the areas of education, school administration, and counseling.

9 Mr. Green's involvement in the charged offenses consisted of acting as his wife's
10 administrative assistant. He was not at all involved in the planning or organizing aspects of the
11 conspiracy, and was not paid at all. Mr. Green does not know how much money his wife made
12 as a result of her activities. However, he believes nearly all of the income she did realize she lost
13 gambling.³ Prior to their arrest, the Greens lived quite modestly and well within the lifestyle one
14 would expect for two retirees from public school systems. Since his arrest, Mr. Green has
15 returned to working and maintained steady employment as an "inspector" for a company that
16 markets rebates for energy efficient appliances and building systems. Mr. Green now makes
17 approximately \$400/week, and he lives paycheck to paycheck. He and his wife have lost their
18 home to forfeiture and they live in a condominium apartment rented from a friend. Since their
19 arrest in this matter they have gone through bankruptcy proceedings in addition to losing their
20 home.

21 In sum, Mr. Green is hardly the typical fraud defendant in that he has never shown any
22 interest in wealth, and has instead chosen to toil in a public-service oriented career that provided
23 him very modest financial rewards. Moreover, even though he did participate in his wife's fraud
24 scheme, he did not do so in order to make money. He involved himself only in order to support
25 his wife, who repeatedly told him that her activities fell within accepted business practices and
26 that she was doing a great deal to help poor school districts obtain valuable grants. He has
27

28 ³ Mr. Green believes his wife suffers from several psychiatric disturbances, including manic depression, chronic abuse of psychotropic medication, and compulsive gambling.

1 candidly and ruefully admitted that he knew that the foundation he discussed with officials at the
 2 Philadelphia Academy did not have funding to pay for the schools required co-payment, and that
 3 misrepresentation is the basis for his guilty plea.

4 B. The Need for the Sentence Imposed to Satisfy Certain Articulated Purposes.

5 1. **To Reflect the Seriousness of the Offense, to Promote Respect for the
 6 Law, and to Provide Just Punishment for the Offense.**

7 Though the charged crime in the present case is a felony, it is, compared to many other
 8 Federal offenses, not particularly serious. This is not to minimize the defendant's criminal
 9 behavior in the present case but merely to put in perspective. This offense involves conduct
 10 where the only victim was the federal government, and the government suffered no actual loss
 11 because the Philadelphia Academy's E-Rate application was denied.⁴ Although the guidelines
 12 call for a "loss" figure of \$200,000-\$400,000 (because this is the amount that of the
 13 contemplated funding of Philadelphia academy), in fact there was no monetary loss at all
 14 because the application for funding was denied.

15 2. **To Afford Adequate Deterrence to Criminal Conduct.**

16 Mr. Green submits that a term of probation with 60 days community confinement
 17 followed by 6 months of home detention would be more than sufficient to deter him from
 18 committing any new offenses.

19 Mr. Green committed his first criminal offense at age 59. Moreover, Mr. Green became
 20 involved in the fraud scheme at the direction of his wife, who will be in prison for the next seven
 21 and a half years (until Mr. Green is 71). Given Mr. Green's age and the fact he will be separated
 22 from his wife, who instigated Mr. Green's criminal conduct, there is little chance Mr. Green will
 23 re-offend.

24 U.S. probation has concluded, "it is anticipated that the consequences [Mr. Green] has
 25 endured and will continue to endure will deter him from any future criminal conduct." PSR at
 26 Sentencing Recommendation, p.2. We ask the Court to consider that Mr. Green now has a

27 ⁴ As Mr. Green noted above, he only became involved in the E-Rate business at the very end of
 28 the conspiracy. By that time federal agents and auditors were already aware of abusive practices in the
 program, so when the Philadelphia Academy application was submitted it was quickly denied, as were
 all of the other "year six" applications prepared by ADJ Consulting.

1 felony conviction which will make it very difficult, especially at his age, to get hired. The
 2 requested sentence will permit him to keep his current employment - which is an enormously
 3 important thing at this point in his life. Under the circumstances probation, community
 4 confinement and home detention are more than adequate to deter future criminal conduct.

5 **3. To Protect the Public from Further Crimes of Mr. Green.**

6 Mr. Green simply shows no proclivity, much less opportunity, to commit any additional
 7 crimes. He is genuinely remorseful and ashamed that he accepted his wife's representations that
 8 her conduct of ADJ Consulting was within the realm of accepted business practices. Mr. Green
 9 poses no threat to the public.

10 The extent of Mr. Green's contrition is perhaps best exemplified by his decision to
 11 cooperate with the government even though it meant he would have to provide information to the
 12 government that would incriminate the woman to whom he has been married for the past forty
 13 years. Mr. Green's decision to cooperate in a manner that he knew would harm his wife caused
 14 him great distress, and he cooperated only because he now fully understands that the way in
 15 which his wife conducted her E-Rate consulting business was improper and unlawful.

16 Moreover, Mr. Green's conduct - at age 59 playing a minor role in a scheme to defraud a
 17 government entitled project, which scheme was orchestrated by his wife who will be in prison for
 18 the next seven years - poses no ongoing threat to public safety, so the need to protect the public
 19 from additional such crimes is not compelling.

20 **4. To Provide Mr. Green with Needed Educational and Vocational
 21 Training, and Correctional Treatment.**

22 Mr. Green has a Masters degree in education, various teaching and public administration
 23 certificates, and a long history of work in the public schools. He does not require further
 24 vocational training or education.

25 However, Mr. Green and his wife are, as a result of their convictions, in a precarious
 26 financial situation. Mr. Green will not be able to get employment at a public school following
 27 this conviction. He and his wife have declared bankruptcy and have been living at a friend's
 28 second home that is currently listed for sale. In order to assure that he has a place to live, Mr.
 Green must continue working. If he is imprisoned for a significant period of time when his wife

1 is also in prison, Mr. Green may not be able to continue to maintain a home for himself, or for
2 his wife when she is released.

3 C. The Kinds of Sentences Available.

4 The Sentencing Act allows for a term of imprisonment or a probationary sentence of up to
5 five years on a conviction of this section 371 offense. See 18 U.S.C. section 3561(C). The
6 Guidelines set the appropriate punishment for this type of offense as imprisonment. See
7 U.S.S.G. § 5C1.1(f). However, Mr. Green asserts that his case lacks many of the characteristics
8 present in federal offenses which result in prison sentences. Moreover, now that the Sentencing
9 Act controls, rather than the Guidelines, Mr. Green is eligible for probation or community
10 confinement, or a “split sentence” including both community confinement and imprisonment.

11 In *Booker*, the Supreme Court severed and excised 18 U.S.C. section 3553(b), the portion
12 of the federal sentencing statute that made it mandatory for courts to sentence within a particular
13 sentencing guidelines range. *Booker*, 125 S. Ct. at 756. This renders the sentencing guidelines
14 advisory. *Id.* 18 U.S.C. sections 3551, 3559, 3561, 3571, and 3581 now control the types of
15 available sentences based upon a defendant’s conviction.

16 Since the guidelines are now only advisory, the sentencing table and the restrictions on
17 probationary sentences, sentences of home confinement, and split sentences in U.S.S.G. § 5A,
18 5B1, and 5C1 are also advisory. Thus, to receive a sentence of probation, the defendant does not
19 have to come within Zones A or B, and to receive a split sentence the defendant does not have to
20 come within Zone C. Accordingly, Mr. Green is eligible for such alternative sentences, even if
21 the Court decides Mr. Green’s guidelines range falls within Zone C or D. See, e.g., *United States*
22 *v. Chettiar*, 501 F.3d 854 (8th Cir. 2007)(approving a split sentence including time in a halfway
23 house and home detention where “the district court applied the substitution options available in
24 Zone B to a level thirteen offense by shifting the sentencing table’s Zone B overlay upward three
25 levels.”); *United States v. Kononchuk*, 485 F.3d 199 (3rd Cir. 2007)(holding that “under *Booker*,
26 the Guidelines’ disallowance of the option of probation is, of course, merely advisory,” and
27 noting that a district court may choose “not to follow the advisory provisions of Zone D of the
28 Guidelines sentencing table ...”).

1 In the Los Angeles Area where Mr. Green lives and works there are many community
 2 confinement facilities, and U.S. Probation is funded and has contracted for numerous spaces in
 3 these community confinement facilities. Although there is often a waiting list for these spaces, if
 4 a defendant is sentenced to such a facility, as opposed to seeking voluntary admission, the
 5 sentenced defendant takes priority over those seeking optional admission.

6 D. The Kinds of Sentence and the Sentencing Range Established for the Applicable
 7 Category of Offense Committed by the Applicable Category of Defendant as Set
 8 Forth in the Guidelines.

9 Mr. Green submits that his guidelines range should be calculated as follows:

- 10 - Adjusted offense level of 18 (USSG § 2X1.1(c)(1), 2B1.1(b)(1)(G))
- 11 - Minus Two Levels for Minor Role (USSG § 3B1.2)
- 12 - Minus Three Levels for Acceptance (USSG § 3E1.1)
- 13 - Minus Two Levels for Departure for cooperation with the Government (USSG § 5K1.1)
- 14 - Total Offense Level = 11

15 The guidelines range for a level 11 offense, with a criminal history score of 0 (category I)
 16 is 8 to 14 months imprisonment, in Zone C of the sentencing table.

17 U.S. Probation has concluded that Mr. Green should not receive any adjustment for role
 18 in the offense. See PSR at ¶ 30, Addendum ¶ 3. The probation officer asserts Mr. Green should
 19 not receive a minor role adjustment because his plea agreement only involved the Philadelphia
 20 Academy charge, not the larger conspiracy, and Mr. Green played a more active role in the
 21 Philadelphia Academy E-Rate scheme. See PSR at Addendum ¶ 3. Mr. Green asserts U.S.
 22 Probation's recommendation is based on a mistaken belief Mr. Green "took control of the
 23 Philadelphia Academy's E-Rate process." See *id.*

24 In fact, as Brien Gardiner's testimony at the trial of Judy Green, Judy Green's declaration,
 25 and the statements of all of the government's witnesses concerning the "year six" E-Rate
 26 applications show, Allan Green did not play a major role in Philadelphia Academy's E-Rate
 27 application. Instead, Mr. Green was sent by Judy to make initial contact with Philadelphia
 28 Academy and to make a sales pitch. Thereafter he simply accompanied his wife to several
 meetings with the Philadelphia Academy staff. At the meetings Judy Green "indicated she could

1 help [Philadelphia Academy obtain E-Rate funding] and pretty much do it from inception, from
2 beginning to end, the whole process.” In contrast, Allan Green’s knowledge of the process was
3 so limited that he had to call his wife in response to a question from Mr. Gardiner, to find out the
4 name of Judy Green’s consulting business for this particular E-Rate application.

5 In sum, Mr. Green’s involvement in the Philadelphia Academy’s E-Rate application
6 consisted of attending an introductory meeting with the staff at which Mr. Green informed the
7 staff that his wife could help them obtain E-Rate funding. From that point forward, Judy Green
8 completely controlled the process, as she did in the case of all of the other “year six”
9 applications. Mr. Green’s conduct therefor warrants a minor role adjustment.

10 In addition, Mr. Green cooperated with the government, and against his wife, and the
11 Government has made a motion for a departure from the applicable Guidelines range pursuant to
12 Guidelines § 5K1.1. As a result of Mr. Green’s cooperation, the government has recommended a
13 departure equivalent to a two-level reduction in Mr. Green’s offense level. If the Court were to
14 adopt the government’s recommended two-level departure, and find Mr. Green played a minor
15 role in the offense, the resulting offense level would be 11. Given Mr. Green’s Category I
16 criminal history, an offense level of 11 would result in a Guidelines range of 8 to 14 months, in
17 Zone C of the sentencing table. Of course, the court could also reach a level 11 (without Minor
18 Role adjustment) by deciding to depart 4 levels, rather than the 2 levels the government seeks.
19 See, e.g., *United States v. Hanna*, 49 F.3d 572, 576 (9th Cir. 1995)(noting that a district court’s
20 decision as to the extent of a 5K1.1 departure is entirely discretionary). With a Minor Role
21 adjustment, a four level departure would result in an offense level of 9 (Zone B, 4-10 months).

22 Finally, the adjusted offense level in this case is based on a “loss” figure of \$200,000 to
23 \$400,000. Although this is the correct and agreed upon loss figure under the Guidelines (because
24 it is the amount that would have been awarded to Philadelphia Academy if the application was
25 granted), in fact, the application was denied and there was no actual loss whatever. Mr. Green
26 respectfully suggests that the Court should adjust it’s sentencing decision downward to account
27 for this obviously important fact.
28

1 E. Pertinent Policy Statements Issued by the Sentencing Commission.

2 Application Note 1(b) for Guidelines section 5B1.1, which concerns imposition of a term
3 of probation, directs that when the Court chooses to place a defendant facing more than one year
4 of imprisonment on probation, the term of probation should include a period in home detention
5 or community confinement. Mr. Green agrees that a period of community confinement, with
6 work release, followed by home detention, would be appropriate in his case.

7 Similarly, Application Note 6 for Guidelines section 5C1.1 (concerning terms of
8 imprisonment) suggests, “there may be cases in which a departure from the guidelines by
9 substitution of a longer period of community confinement than otherwise authorized for an
10 equivalent number of months of imprisonment is warranted to accomplish a specific treatment
11 purpose.” Mr. Green therefor submits that should the Court choose to deny probation and
12 impose a term of imprisonment, his would be an appropriate case for shortening the term of
13 imprisonment and adding community confinement to his supervised release because of his age,
14 his lack of prior criminal history, his good employment history, and his relatively minor role in
15 the offense.

16 F. The Need to Avoid Unwarranted Sentence Disparities Among Defendants with
17 Similar Records Who Have Been Found Guilty of Similar Conduct.

18 Earl Nelson, another lesser defendant who participated in only a few of the fraudulent E-
19 Rate applications at issue in this case, was recently sentenced to a term of two years of probation,
20 including terms of one month in a halfway house and with five months of home detention. Mr.
21 Green asserts his conduct is no more serious than that of Mr. Nelson and warrants a sentence
22 similar to Mr. Nelson’s.

23 Mr. Nelson, like Mr. Green, is unusually old for a first time offender and had previously
24 lived an entirely law abiding life. Also like Mr. Green, Mr. Nelson showed genuine contrition
25 for his role the fraud scheme and posed little threat of re-offending. In sum, all of the factors that
26 warranted a probationary sentence for Mr. Nelson weigh in favor of a similar sentence for Mr
27 Green.

28 G. The Need to Provide Restitution to Any Victims of the Offense.

The federal government is the victim in this offense, and there was no actual loss.

1 CONCLUSION

2 Given all the factors discussed in this Memorandum, Mr. Green respectfully submits that
3 a sentence of a term of 3 years of probation, with a condition requiring a 60 day term of
4 community confinement, to be followed by 180 days home detention, is the appropriate
5 disposition of this case. Such a sentence would address the sentencing factors listed in section
6 3553, would allow for Mr. Green to continue working and to maintain a home for himself and his
7 wife, and would take into account his role in this offense vis á vis his wife, and his long public
8 service to the community through his career in public education.

9
10 Dated: April 2, 2008.

Respectfully submitted,

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13 MARK ROSENBUSH
14 Attorney for Defendant
15 ALLAN GREEN
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